

March 29, 2005

A-18J

Jeffrey Hanson, Chief
Permits and Stationary Source Modeling
Wisconsin Department of Natural Resources
101 South Webster Street
P.O. Box 7921
Madison, Wisconsin 53707

Dear Mr. Hanson:

The purpose of this letter is to provide the United States Environmental Protection Agency's (USEPA) comments on Wisconsin's proposed rule, "New Source Review (NSR) Minor Linkages and Fees" AM-32-04a, also commonly referred to as the "The Interface Rule." It is our understanding that the State will be moving to adopt this rule and submit a request for State Implementation Plan (SIP) approval to USEPA after the close of the public comment period on March 29, 2005.

The proposed rule affects provisions of Wisconsin's regulatory code, including NR. 400, Air Pollution Control Definitions, NR. 406, Construction Permits, and NR. 407, Operation Permits. The rule makes various changes including creating an enhanced NSR process and allowing certain conditions in NSR permit to be identified as state-only.

The enclosed comments identify provisions in the proposed rule that we have concerns with. We will work with you to address these concerns so that we are able to approve this rule into the SIP. We recommend that you do not move forward with adoption of these provisions until these concerns have been addressed.

If you have any questions or would like to discuss this in further detail, please do not hesitate to contact me, or contact Susan Siepkowski, of my staff at (312) 353-2654.

Sincerely yours,

/s/

Pamela Blakley, Chief
Air Permits Section

Enclosure

cc: Lloyd Eagan, Director
Bureau of Air Management
Wisconsin Department of Natural Resources

Enclosure - SIP Approvability Comments

1.) Plain Language Rule Analysis Section:

a.) First paragraph: Wisconsin cannot use the Title I authority approved into its SIP to create non-federally enforceable permit terms. Title I of the Clean Air Act does not provide for state-only enforceable conditions in permits. All terms and conditions in SIP-approved permits are federally enforceable. Any state-only terms would have to be created with an established authority and process outside of a SIP-approved program.

USEPA's May 20, 1999, memo to Robert Hodanbosi from John Seitz states, "If a State does not want a SIP provision or SIP-approved permit condition to be listed on the Federal side of a title V permit, it must take appropriate steps in accordance with title I substantive and procedural requirements to delete those conditions from its SIP or SIP-approved permit."

b.) Second paragraph: Wisconsin can't use the enhanced NSR process until it has USEPA-approved rules ensuring that its process meets the requirements of 40 CFR Part 70.7(d)(1).

c.) Fourth paragraph: Wisconsin can use the Minor Modification procedure in Part 70 only for changes that meet the substantive criteria of 70.7(e)(2). Allowing the use of the Minor Modification process isn't only based on a question of whether the change has gone through the appropriate public/EPA review processes, but whether all of the criteria are met. It may be possible to do such an analysis for the types of changes Wisconsin is proposing would qualify for the Minor Modification process.

2.) Federal Regulatory Analysis Section, first paragraph: This issue has come up in other Regions, such as Region 1, 8, and 9, and we need to continue to investigate what has been allowed nationally. USEPA Region 8 provided comments on this issue in its April 2, 2002, letter to the Montana Board of Environmental Review regarding Montana's proposed rule. Comments include, "If the State is proposing to change its SIP-approved permit program to allow for inclusion of permit terms that are non-federally enforceable a justification as to why certain provisions do not warrant Federal (and citizen) review and enforceability would need to be submitted with the rule revision." And, "Without more details on how this particular program change would be implemented so as to ensure continued compliance with all

provisions in the SIP, we have potential backsliding concerns with this provision and we believe we cannot approve such a change."

- 3.) State Regulatory Analysis Section, first paragraph:
Region 5 has not approved any state provisions that allow for non-federally enforceable conditions in NSR permits. Although Michigan proposed such a provision, in a November 2002, letter to G. Vinson Hellwig, Region 5 stated that, "Because Title I of the Clean Air Act does not specifically provide for state-only enforceable conditions, we do not know if we will be able to approve a program allowing such conditions into the SIP."

Similar to the comments provided to other states, we do not know if we will be able to approve a program allowing such conditions into the SIP. USEPA Region 5 will work with you to determine if there is an approvable approach to create such requirements in a construction permit using an authority other than a SIP-approved permit program.

- 4.) Section 1: NR 400.02(64): All requirements in a permit issued pursuant to a SIP-approved program are federally enforceable. See #1.
- 5.) Section 3:
 - a.) NR 406.075(1): State law can't define or limit federal authorities. Therefore, this section isn't approvable into the SIP. However, a state can establish its own programs outside of the SIP process.
 - b.) NR 406.075(2): As already discussed, Wisconsin can't make non-federally enforceable any term in a permit issued pursuant to a SIP-approved program.
- 6.) Section 4: NR 407.11(1)(e): Either the heading or the rule is misnumbered. In the rule labeled 407.12(1)(e), the procedural requirements of s.285.62(1) to (7) must require process as required in 40 C.F.R. 70.6, 70.7 and 70.8, and the process must be USEPA approved.
- 7.) Section 6: 407.12(1)(intro): Meeting the procedural requirements of an enhanced NSR program doesn't ensure that the proposed change doesn't trigger any of the substantive requirements of 70.7(e). The proposed change must satisfy both criteria of 407.12(1)(a) and (b). Also, NR 406 referred to in 407.12(1)(a) must comply with the requirements of 70.7(d) for enhanced NSR.